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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORLANDIS WELLS, M.D.,

Defendant.

CASE NO.: 2:19-cr-00216-ART-NJK

SUPPLEMENTAL BRIEFING ON
MOTION TO DISMISS, PURSANT TO
COURT'S MINUTE ORDER (ECF 106)

Now comes Defendant, ORLANDIS WELLS, M.D., by and through his undersigned counsel, and gives his Supplemental Briefing to the Plaintiff, UNITED STATES OF AMERICA, and the Court, pursuant to the Minute Order (ECF 106).

PROCEDURAL HISTORY

This is a Supplemental Briefing to Dr. Wells' Motion to Dismiss All Counts of the Indictment. On February 13, 2023, the Court filed a minute order, notifying Dr. Wells and the Government to be prepared to discuss two cases that the Court has reviewed, *United States v. King*, 587 F.2d 956, 964 (9th Cir. 1978) and *United States v. Kim*, 298 F.3d 746, 750 (9th Cir. 2002). The Court gave Dr. Wells the option to submit a supplemental briefing on this issue. This Supplement follows.

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2 **ARGUMENT**

3 The language used in Dr. Wells' indictment is as follows:

4 Orlandis Wells, M.D. defendant herein, did knowingly and intentionally distribute
5 a mixture and substance containing a detectable amount of a Schedule II
6 controlled substance, to wit: hydrocodone, as listed below, without a legitimate
7 medical purpose and outside the usual course of professional practice, each of
8 which constitutes a separate count of this Indictment: (ECF No. 1, Pg. 5)9 The indictment proceeds to list the patients and days of the prescription, and includes the
10 same language for the counts regarding the prescription of oxycodone. As Dr. Wells has
11 previously argued in length in his Motion to Dismiss and Reply, this indictment is insufficient
12 under *Xiulu Ruan v. United States*, 142 S. Ct. 2370 (2022). As Dr. Wells argued, *Ruan* changed
13 the burden of proof and the necessary elements to successfully prove a violation of the
14 Controlled Substances Act, when the defendant is authorized to dispense a controlled substance.15 In reviewing *Kim*, 298 F.3d 746 and *King*, 587 F.2d 956, Dr. Wells finds that both
16 holdings bolster Dr. Wells' contention that the indictment is insufficient. Additionally, both
17 *Kim*, 298 F.3d 746 and *King*, 587 F.2d 956 hold, as Dr. Wells stated in his Reply, that the
18 indictments lack the necessary elements to put Dr. Wells on notice, as is required by the
19 Fourteenth amendment to the United States Constitution.20 In *King*, 587 F.2d 956 the Ninth Circuit held that an indictment was insufficient, by
21 failing to charge all necessary elements of the offense. The dismissal was prompted by the
22 Government's failure to include the fact that the Defendant, Dr. Deal, was not authorized to
23 prescribe Cocaine.¹24

¹ It should be noted that in *King*, the relevant defendant was indicted on the distribution of
cocaine at an airport, completely outside the scope of medical practice. Even then, the *King*
Court found that a full and complete indictment, including his lack of authorization, was

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2 *King* goes on to state:

3 The failure of an indictment to detail each element of the charged offense
4 generally constitutes a fatal defect. It is of paramount importance to the rights of
5 the accused that the indictment contain an adequate recitation of each component
6 of the crime that the Government must establish.
7 *United States v. King*, 587 F.2d 956, 963 (9th Cir. 1978) (Internal citations omitted)

8 The holding in *Ruan*, 142 S. Ct. at 2370, can be reviewed as attributing a new element
9 required to indict a medical practitioner of violating the controlled substance act. This case,
10 when reviewed in addition to *Ruan*, demonstrates the importance of each element, including the
11 Scienter that is missing from Dr. Wells' indictment. Post-*Ruan*, the Supreme Court has held that
12 the government, in order to prove their case, must demonstrate and center their case on the
13 defendant's subjective belief. The Government's allegations in the indictment fail to provide
14 any accusation on Dr. Wells' subjective belief, as the requirements needed to prove a violation
15 of the Section 841 of the Controlled Substance Act did not require the Doctor's subjective belief
16 at the time the indictment was obtained.

17 *Kim*, 298 F.3d 746 demonstrates an example of the subjective belief that is plainly
18 missing in Dr. Wells' indictment. *Kim* holds that the indictment against the Appellant was
19 sufficient when it included the relevant portion:

20 Unlike the indictment in *King*, the indictment in Stoll did inform the defendant that he
21 was charged with possessing pseudoephedrine that he knew would be used to manufacture
22 methamphetamine in violation of 21 U.S.C. § 841(d)(2). The pharmacist's authorization was to
23 sell pseudoephedrine for "legitimate medical use." 21 U.S.C. § 802(46)(B). The indictment
24 informed Stoll that the government charged him with criminal conduct not covered by the
exception. Kim was similarly charged with distributing pseudoephedrine with reason to know
that it would be used to make methamphetamine in violation of 21 U.S.C. § 841(d)(2). The
elements of the crime in each case were sufficiently set forth. *United States v. Kim*, 298 F.3d
746, 750 (9th Cir. 2002) (Emphasis added)

necessary. This highlights the standard required to pursue an indictment against a medical
practitioner.

1 In *Kim*, 298 F.3d 746 the indictment clearly and plainly speaks to the defendant's
2 subjective belief. The indictment alleges that the defendant, a pharmacist, had the belief that the
3 medication he distributed was for the manufacturing of methamphetamine, which is clearly not
4 a protected distribution of a controlled substance. This type of accusation should not be difficult
5 to provide in a criminal indictment. In fact, it is required by *King*, 587 F.2d 956 and *Ruan*.
6 Despite this, the Government's indictment completely fails to specify any aspect of Dr. Wells'
7 subjective belief when prescribing, but also completely fails to specify what particular action or
8 lack thereof of Dr. Wells' transformed routine medical work into criminal violations.

9 Additionally, *Kim*, 298 F.3d 746 and *King*, 587 F.2d 956 both support Dr. Wells'
10 assertion that the indictment violates his rights to notice under the Fourteenth Amendment to the
11 United States Constitution. In the almost six years that this case has been held against Dr. Wells,
12 the government, despite every opportunity, has failed to state what actions Dr. Wells' undertook
13 that constitutes over 30 violations of the CSA, or allege his subjective belief. As the indictment
14 reads, the Government only alleges that Dr. Wells knowing and intentionally prescribed opiates.
15 That much is uncontested. It also alleges that the prescriptions may fall outside of Dr. Wells'
16 authorization. However, it does not specify or allege that Dr. Wells' had a subjective belief that
17 his prescriptions were unauthorized, as required by *Ruan*. Without this part, this indictment is
18 left without a crucial element necessary to put Dr. Wells on notice.

19 After *Ruan*, the standard is no longer "he acted outside of his authorization" as the
20 indictment in *Kim*, 298 F.3d 746 states. *Ruan* has established the requirement that the doctor
21 *knew* he acted outside of his authorization. While the Government's may be inclined to presume
22 that Dr. Wells knew he acted outside of his authorization, they clearly fail to specify that crucial
23 element of the indictment, which *King*, 587 F.2d 956 has determined to be grounds for
24 dismissal. Additionally, Dr. Wells' is unable to discern any evidence in the discovery that

1 attempts to even allege any aspect of his subjective belief, and doubts that it even exists. As
2 both *Kim*, 298 F.3d 746 and *King*, 587 F.2d 956 establish the necessity of including every
3 element of the charge, and *Ruan* specifies an element that is not alleged in the indictment, there
4 is a compelling need to dismiss reason to follow the holding in *King*, 587 F.2d 956 and *Kim*,
5 298 F.3d 746 and dismiss Dr. Wells' indictment.

6
7 **CONCLUSION**

8 Having failed to prove the elements necessary for the Indictment, Dr. Wells respectively
9 moves this court to dismiss this Indictment in full.

10 Wherefore,

11 Dated this 17th day of February, 2023.

12
13 /s/ Christopher R. Oram
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2023, I served a true and correct copy of the foregoing document entitled **SUPPLEMENTAL MOTION TO DISMISS** to the United States Attorney's Office and all other parties associated with this case by electronic mail as follows:

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By: /s/ Scott Reynolds Egnor
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